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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

BRAD HAYWOOD SIMS,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

STATEMENT OF ISSUES PRESENTED

1. In light of the Fourth Amendment's preference for warrants, may a state appellate court system maintain a policy of invalidating search warrants by a process of reading into affidavits on which warrants were issued false facts, which were not stated in the affidavits or communicated to the issuing magistrates and then invalidating the warrants on the basis of the falsity of such facts, where probable cause remains when the negation of such facts is read into the affidavits?

2. (A) Should a criminal conviction be reversed under Batson v. Kentucky, (476 U.S. 79 [1986]), without a determination that a prima facie case of racial discrimination has been made out or a finding of purposeful racial discrimination by the trial court?

2. (B) In a prosecution for unlawful distribution of drugs, does an appellate court err in ruling as a matter of law that

the fact that a venireperson resides in a neighborhood which has a high crime rate, particularly relating to drugs, is not a race neutral reason for striking venirepersons?

2. (C) Are the facts that venirepersons wear dark glasses indoors, chew gum in the courtroom, appear depressed and give hesitant responses to voir dire questions race neutral reasons for striking such persons?

THE PARTIES

In the Circuit Court of Montgomery County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Brad Haywood Sims, who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner, respectively.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above-styled cause.

OPINIONS AND ORDERS BELOW

The Circuit Court of Montgomery County, Alabama, issued no formal orders in overruling the Respondent's motion to suppress or his Batson[1] objection at the time of trial.

The opinion and order of the Court of Criminal Appeals of Alabama reversing the Respondent's conviction are not yet reported but will be reported as follows:

Sims v. State, ___So.2d___

(Ala. Cr. App, 1991)

A copy of the same is submitted in Appendix "A" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing will be reported as part of the report of the Court's opinion, as set out above.

A copy of the same is submitted as Appendix "B" hereto.

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[1]Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).

The order of the Supreme Court of Alabama denying certiorari review will be reported as part of the report of the Court of Criminal Appeals' opinion.

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on October 4, 1991, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supreme Court and Court of Criminal Appeals of Alabama, believed that their decisions were mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said

provisions. Said constitutional provisions read:

"AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. The Respondent was indicted and convicted under Section 13A-12-211, Code of Alabama, 1975, and the jury was selected pursuant to Section 12-16-100 of the same Code. Copies of these statutes are submitted in Appendix "D" hereto.

STATEMENT OF THE CASE

The Respondent, Brad Haywood Sims, was indicted for unlawful distribution of a controlled substance more particularly described as cocaine, by the Grand Jury of Montgomery County, Alabama, at its October, 1989, Term. (R. Vol. XIV, pp. 2039-2040)

On November 21, 1989, the Respondent waived arraignment on the indictment and pleaded not guilty. (R. Vol. XIV, p. 2051)

The search and seizure issue raised by this petition was first raised by a motion to suppress evidence found pursuant to a search warrant which was filed in the Trial Court.

(R. Vol. XIV, pp. 2055-2070) A hearing was held on the same on December 8, 1989, and it was overruled. (R. Vol. XIV, p. 2055; Supp. R.)

On January 23, 1990, following an ealier mistrial, the cause came on for trial before Honorable Joseph D. Phelps, a Circuit Judge, and a jury. The Respondent was attended by his Attorneys, Honorable Julian McPhillips and Honorable Kenneth Shinbaum, and the State was represented by its District Attorney, Honorable James H. Evans and his Chief Deputy, Honorable Ellen Brooks, and Assistant, Honorable Bruce Lieberman. (R. Vol. IV, pp. 1 ff)

After the jury was struck but before it was empaneled, the Respondent made an objection under Batson v. Kentucky (476 U.S. 79, 90 L.Ed. 2d 69, 106 S. Ct. 1712 [1986]), thereby first raising the other issues presented by this petition. The Trial Judge,

without ruling the question of whether the Respondent had made out a prima facie case of racial discrimination, required the Prosecutor to state her reasons for her strikes, which she did. His Honor then overruled the Batson objection on the grounds that the Prosecutor had stated race neutral reasons for her strikes.[1] (R. Vol. IV, pp. 146-169) No further proceedings were held on the motion.

The jury, on hearing the evidence, argument of Counsel and charge of the Court, found the Respondent guilty of distributing cocaine as charged in the indictment. The Respondent was then adjudged guilty. (R. Vol. XIV, pp. 2035 and 2041)

On March 21, 1990, the Respondent was sentenced to ten (10) years imprisonment. In lieu thereof he was granted probation, after serving three years in prison. The Appellant was ordered to pay $25.00 to the

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1. "...The Court will accept that explanation...." (R. Vol. IV, p. 169)

Alabama Victim's Crime Fund. (R. Vol. XIV, p. 236) Appeal followed.

On June 14, 1991, the Court of Criminal Appeals of Alabama reversed and remanded the case. The Court read int the search warrant affidavit facts which were not stated therein and then condemned as false such unstated facts and, thereby invalidated the warrant. In addition, the Court gave the Trial Court's ruling on the Respondent's Batson objection de novo review, did not treat the same as a credibility choice, as mandated by this Honorable Court, and reversed the Respondent's conviction, even though the Trial Judge had never ruled on two of the three steps of the Batson process. (Appendix "A")

The State applied for rehearing raising the matters herein presented and requested the finding of additional facts,

but the same were overruled and denied on July 26, 1991. (Appendix "B")

The State of Alabama, Your Petitioner, sought review by a writ of certiorari in the Supreme Court of Alabama, raising the issues herein presented and pointing out; (1) That the practice of reading false facts into search warrant affidavits and invalidating warrants on the basis of such facts, is contrary to the policy of the Fourth Amendment and the teachings of the Honorable Court and (2) that the Court of Appeals review of the Batson issue was in irreconcilable conflict with this Court's pronouncements on that subject. However, on October 4, 1991, the Alabama Supreme Court rejected your Petitioner's petition. (Appendix C)

STATEMENT OF THE FACTS

The evidence upon which the Respondent was convicted is not relevant to the issues

here presented and is submitted as Appendix "E" to this petition.

I.

ON THE SEARCH WARRANT AFFIDAVIT

The Court of Criminal appeals of Alabama ruled that the search warrant in this case was invalid, because it was issued on an affidavit which contained a false statement, namely, that the informer had entered the Respondent's house and observed a drug transaction. The affidavit did not, in fact, contain such a statement, and the unconflicting evidence is that the affiant officer did not intend to communicate such to the magistrate, and no evidence was offered at the hearing on the warrant that the magistrate understood that the informer had entered the house.

The information for the search warrant affidavit arose out of an investigation by the Montgomery Police Department, which was directed toward a

cocaine dealer know as "Miami." The idea was to have an informer make a controlled buy from Miami, using marked money.

On September 29, 1989, an informer, named Julius Moore, was given $600.00 in bills, whose serial numbers had been recorded, and sent out to find Miami. He did not succeed in locating Miami, but he did obtain the assistance of a second person in locating cocaine. This person led Moore to one Eric Johnson, who led the trio to 3437 South Perry Street. Johnson went into the house and returned with cocaine, which Moore inspected. Moore gave Johnson $400.00 in marked money, which Johnson took into the house. Johnson and the Respondent then came out to Moore's car, and the Respondent told Moore that he would have several ounces of cocaine the following day. (Supp.R. pp. 6-15)

The information so obtained was made the basis of a search warrant affidavit

executed the next day, which read in pertinent part as follows: —

> "...'That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy- two (72) hours...."
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.
>
> "Further probable cause being that 'A' has given the affiant information in the past which has proven true through investigative means.
>
> "Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.
>
> "Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.
>
> "Further probable cause being that intelligence information obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.

> "As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed at least with a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics & Intelligence Bureau, Administrative Division, Montgomery Police...." (R. Vol. 14, pp. 2045; emphasis supplied)

The execution of the search warrant on September 30, 1989, led to the discovery of $932.00 hidden in a closet. Among the $932.00 in currency were $360.00 in bills which had originally been provided to Moore. (Supp. R.pp. 10-11)

The affidavit did not state that the informer ever went into the house, and the officer testified at the hearing that he used "stored at" in the first paragraph above, simply to mean "located at". (Supp. Trans. p. 13). At the hearing on the motion to suppress the

fruits of the search warrant, no evidence was offered that the warrant magistrate understood that the informer entered the residence at the time the warrant was issued.

II.

ON BATSON

The Trial Judge in this case never ruled on the issue of whether a prima facie case of a Batson violation had been made out; he responded to the Batson objection by immediately ordering the Prosecutor to state her reasons for strikes. He did, however, find that the Prosecutor had race neutral reasons for each of her strikes. The Court of Criminal Appeals ruled that the Trial Judge's action constituted an implied finding of prima facie case, reviewed the Trial Judge's findings on the racial neutrality of the strikes de novo, and rejected the Trial Judge's findings as to four of the prosecutor's strikes. In so doing, the Court of Appeals did not even

consider the whole evidence on these venirepersons.

The Court of Criminal Appeals found that four of the Prosecutor's strikes were pretextural. The reasons for these strikes as set out, by the Court of Criminal Appeals, were

> "...Juror number 81, [J.M.] lived on Early Street where the police had answered a call, and this particular neighborhood has been identified as a high crime area, in particular, drugs.
>
> "Juror number 25, [H.W.]. Our information there -- and I personally observed [H.W.] in court chewing gun, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior proceedings. My opinion was that she did not want to discuss that, and

perhaps, had further knowledge she did not divulge.

"Juror number 19, Ms. [R.B.]. [R.B.'s] attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court. She had a very depressed look about her face. Further, Officer Jones identified her home area of Riviera Road as being that of a high crime area, in particular, drugs.

"Juror number 75, Ms. [C.]. Ms. [C.] indicated she -- or did not indicate that she heard anything about this case. She came to court, and the best judgment I could make Your Honor, she sat towards the middle rear. She had glasses on. They appeared to be darkly tinted. I could not tell if it was for [medical] reasons or if it was because she had worn sunglasses in the courtroom. Because of the numerous exhibits and documents, blow-ups, and other things, I could not take a chance on whether or not she had a vision problem, or contrary to most people, wore sunglasses indoors." (Appendix "A", pp. 15-16)

Said statements fall short of what was before the Trial Judge and which is shown by the record, with regard to jurors nos. 25 and 19. The complete statement of the prosecutor's reasons for striking these persons were:

> The State struck juror 25, Hester Webb. Our information there -- and I personally observed Ms. Webb in court chewing gum, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior proceedings. My opinion was that she did not want to discuss that, and perhaps, had further knowledge she did not divulge. <u>This case is very complicated and will require close attention and understanding of some very what we think are subtle differences in the case about whether or not someone's involvement in this case and their involvement in any audit or other activity is relevant."</u> (R. Vol. IV, pp. 154-155; emphasis supplied.)

And:

> "...We struck juror number 19, Ms.Rosa Bush. Ms. Bush's attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court.
>
> "THE COURT: Extremely what?
>
> "MS. BROOKS: Sad, She had a very depressed look about her face. Further, Officer Jones has identified her home area of Riviera Road as being that of a high crime area, in particular, drugs. <u>These officers I'm mentioning, Your Honor, Jones and Wooten and others, that we personally reviewed this list with, work primarily in narcotics. However, some of them worked for years in the area of patro', so they are very familiar with this particular area...."</u> (R. Vol. IV, p. 155; emphasis supplied.)

In addition, the Court of Criminal Appeals observed:

> "Several of the reasons that the prosecutor gave for striking prospective jurors were that they lived in high crime areas. See above for reasons given for striking jurors numbers 81 and 19. (We note that one white

> juror who served on the jury was from a neighborhood with higher crime rate than the average neighborhood in Montgomery.)" (Appendix "A" p. 17)

Not mentioned by the Court of Criminal Appeals was the fact that the venire person referred to in the above quoted sentence was Mrs. Elise E. Mitchell, No. 52. The record shows that the Prosecutor wanted to retain Mrs. Mitchell on the jury, because she was a friend of a retired, very highly respected Montgomery Police Chief. (R. Vol. IV, pages 165-166) The record shows that the prosecutor also strove to keep Mrs. Mordean, No. 16, on the jury, because Mrs. Mordean is the mother of a police officer known and respected by the Prosecutor. Mrs. Mordean is black. (R. Vol. IV, p. 165)

SUMMARY OF THE ARGUMENT

1. One of the most fundamnental policies under the Fourth Amendment is the policy favoring searches under judicial supervision through the warrant process. This policy, as developed over the years by the Court, has both a negative aspect, under which evidence found in unexcused warrarntless searches is suppressed, and a positive aspect, under which searches pursuant to warrants are greatly favored. The Alabama policy of invalidating search warrants on the basis of false facts, read into search warrant affidavits, which are not stated, intended to be expressed or understood by the issuing magistrate, discourages the use of the warrant process by putting officers who seek search warrants at the risk of being publicly declared perjurers on the basis of facts they never intended to express.

2. (A) Contrary to the clear directives of this court in Batson v.Kentucky (476 U.S. 79, 96-98, 90 L.Ed. 2d 69, 87-88, 106 S.Ct. 1712 [1986]) and Hernandez v. New York (500 U.S. ___, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1865-1866 [1991]), the Alabama appellate courts have ignored the three-step process. As a result, the conviction in the instant case was reversed without any court ever ruling on whether a prima facie case of racial discrimination was made out or a determination of whether the defendant made out a case of purposeful discrimination

2.(B) In treating the issue of the racial neutrality of the prosecutor's reasons for her strikes as one of law rather than fact, in failing to treat the matter as a credibility choice by the judge who presided at trial, in giving no deference to the Trial Judge's decision and in failing to consider all of the factors

which were before the Trial Judge, the Alabama appellate courts ruled contrary to this Court's clear teachings in Batson v. Kentucky, above, and Hernandez v.New York, above.

ARGUMENT

I

IN RE: THE SEARCH WARRANT

REASON FOR GRANTING THE WRIT:
CONFLICT WITH THE CONTROLLING
OPINIONS OF THIS HONORABLE COURT

The Court of Criminal Appeals of Alabama invalidated the search warrant in this case because the affidavit allegedly contained a statement which was willfully false or made with a reckless disregard for the truth, namely: That the informer had gone into the Respondent's house and observed a drug transaction. But, the affidavit, in fact, contained no such statement. In so holding, the Court followed its own earlier decision in Villemez v. State (555 So. 2d 342 [Ala. Cr. App, 1989]) and claimed to be following this Honorable Court's opinion in Franks v. Delaware (438 U.S. 154, 57 L.Ed. 2d 667, 98 S. Ct. 2674 [1978]). In fact, the Court of Appeal's decision in this case is in irreconcilable conflict with Franks, as well

as all of this Court teachings on review of search warrants, as we will discuss below. However, the Court of Appeal's decision was, indeed, an extension of Villemez. In Villemez the Court of Appeals invalidated a search warrant because the affidavit stated that an "...informant relayed to me...." (555 So. 2d 342, 343) certain information. This statement was held to be willfully false, because the informant had given the information to a fellow officer of the affiant, who relayed it to the affiant officer, who executed the affidavit. In Villemez the Court did not explain why "relayed to me" was a false statement of the facts, nor why any inaccuracy in the language was material, since the incorporation of the full facts would not have defeated probable cause. See, for example, United States v. Flagg 919 F. 2d 499, 500-501 (8th Cir, 1990). In the instant case, the Court of Appeals extended Villemez considerably. The officer used the language "...being stored in ..." to mean "...located at..." in the first paragraph of the affidavit.

Apparently the Court of Appeals implied from that language a claim that the informer had entered the Respondent's residence, even though the officer intended no such understanding and no evidence was offered that the magistrate so understood the affidavit. Had the Court of Appeals rejected this paragraph alone, we would probably not be here, since the remaining seven paragraphs clearly set out probable cause, but the Court also rejected the second paragraph, which read:

> "...Further probable cause being that 'A' witnessed crack cocaine <u>being sold out of</u> the residence located at 3437 Perry Street during the month of September...." (Emphasis supplied)

This paragraph was absolutely true, and, not only does it not state or imply that the informer went into the house, it indicates an outside observance. It does not claim that the informer observed the exchange of money or drugs. Yet, without explanation, the Court of Criminal Appeals found that this statement was false, because the informer did not go into the house. The

Court found these "false statements" material. Yet, if the affidavit, with or without the first paragraph, were, "...supplemented by the omitted information,..." (United States v. Flagg, above, 919 F.2d 499, 501) that the informer did not go into the Respondent's house. The affidavit would still have supported probable cause. The policy established by the Alabama Appellate Courts in Villemez and expanded in this case puts Alabama police officers, who obey the mandate of the Federal Constitution by pursuing the warrant process, in the position of being pilloried as perjurers on the basis of false statements read into their affidavits, which they neither expressed nor intended to express.

In Franks v. Delaware, (438 U.S. 154, 57 L. Ed. 667, 98 S. Ct. 2674 [1978]), this Honorable Court confronted a problem, which created a possible conflict between the integrity and the efficacy of the warrant

process. On the one hand, if a warrant could be issued on the basis of intentional falsehoods, then the process would become a mere sham and the purpose of the process, the protection of citizens, would be defeated. Warrants could be issued on the basis of mere fictions, without any basis in fact, and patently unreasonable searches would be rendered "reasonable" as a matter of law on the basis of perjury. The same result would flow from an absolute bar on any examination of the truthfulness of affidavits. On the other hand, if mere errors in grammar or vocabulary, negligent draftsmanship, or honest mistakes voided warrants, the warrant process would soon degenerate into the sort of technical nightmare that common law pleading became and probably doom the warrant process to the same repudiation that befell common law pleading. The immediate effect of such a policy would be to discourage officers from resorting to the warrant process. This

problem had already been recognized by this Court more than a dozen years before Franks in United States v. Ventresca (380 U.S. 102, 13 L.Ed. 2d 684, 85 S. Ct. 741 [1965]). In condemning the giving of hypertechnical readings to search warrant affidavits, this Court wrote:

> "...Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting...." (380 U.S. 102, 108, 13 L.Ed.2d 684, 689)

In Franks this Court held that willfully false statements and those made with a reckless disregard for the truth void warrants, if such statements are necessary to probable cause. However the Court made it clear that, "...allegations of negligence or innocent mistakes are insufficient ...", (438 U.S. 154, 172, 57 L.Ed.2d 667, 682), to

even require a hearing. Franks is a sound and easily applied rule, which has been effective in preventing the evils it addressed, while placing little additional burden on the police or the lower courts, except, of course, in Alabama.

One of the fundamental principles of the Fourth Amendment is that searches ought to be subject to judicial control through the warrant process. Indeed, a warrantless search, even if justified by probable cause, is unlawful, unless the lack of a warrant is excused. McDonald v. United States 335 U.S. 451, 93 L.Ed. 153, 69 S. Ct. 191 (1948) This Court has often condemned searches, which it found to be justified by probable cause, solely because the evidence establishing probable cause was not presented to a magistrate and a warrant obtained before the search was undertaken. E.g. Johnson v. United States 333 U.S. 10, 13-14, 92 L.Ed. 436, 440, 68 S. Ct. 367

(1947); Chapman v. United States 365 U.S. 610, 5 L.Ed. 2d 828, 81 S. Ct. 776 (1961) "...The reasons for this rule go to the foundations of the Fourth Amendment...." United States v. Ventresca, above, 380 U.S. 102, 106, 13 L.Ed. 2d 684, 687. In applying the Fourth Amendment's policy favoring warrants, this Court has fashioned rules which penalize the unexcused failure to procure search warrants, but the Court has been equally vigorous in condemning policies which unnecessarily burden the warrant process. Such policies are condemned because they discourage resort to warrants.

> "...If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search...." (Illinois v. Gates 462 U.S. 213, 236, 76 L.Ed. 2d 527, 547, 103 S. Ct. 2317 [1983])

Compare Jones v. United States 362 U.S. 257, 270, 4 L.Ed. 2d 697, 708, 80 S. Ct. 725 (1960)[2]. The policy favoring searches pursuant to warrants has, then, both a negative aspect, i.e. the suppression of evidence obtained by officers on their own authority without a legally sufficient excuse, and a positive aspect, which strongly backs the officer who procures a warrant. It is this positive aspect of the warrant policy which the Alabama Appellate Courts ignored in this case and Villemez.

In effectuating the positive aspect of the policy preferring warrants, this Court has established more lenient proceedings for reviewing searches pursuant to warrants. These include: Placing a heavy burden on a party who would attack a search warrant and forbidding de novo review of

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2 Jones was overruled on an unrelated point in united States v. Salvucci 448 U.S. 83, 85, 65 L.Ed. 2d 619, 624, 100 S. Ct. 2547 (1980)

warrants (Illinois v. Gates, above, 462 U.S. 213, 236, 76 L.Ed.2d 527, 546-547; Massachusetts v. Upton, 466 U.S. 727, 80 L. Ed. 2d 721, 104 S. Ct. 2085 [1984]); holding that when willfully false statements or other improper materials are included in warrant affidavits, the warrants are to be upheld unless the improper material is necessary for probable cause (Franks v. Delaware, above, 438 U.S. 154, 171-172 57 L.Ed. 2d 667, 682; United States v. Karo 468 U.S. 705, 719-720, 82 L.Ed. 2d 530, 544-545, 104 S. Ct. 3296 [1984]) and upholding searches undertaken by officers in good faith reliance on even defective search warrants. United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 82 L.Ed.2d 737, 104 S.Ct. 3424 (1984).

Of particular relevance here is the prohibition against giving search warrant affidavits hypertechnical readings. As the Court wrote in Ventresca above,

"...If the teachings of the

> Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting...." (380 U.S. 102, 108, 13 L.Ed.2d 684, 689; emphasis supplied)

"...[E]laborate specificity...." exactly describes what the Alabama appellate courts are demanding of police officers who submit search warrant affidavits. In this case the affidavit was described as false, because the Court believed certain facts were implied, and these facts were not negated in the affidavit. (Appendix "A", pp. 4-5) In Ventresca, the Court was concerned with officers being frustrated when their

recitations of probable cause were rejected on technical grounds. But, lawyers, judges and legal scholars have difficulties with both probable cause and the rules of pleading. Having his affidavit rejected on technical grounds might be frustrating to an officer but it would be no more personally embarrassing to an officer than a lawyer's having his complaint dismissed on technical grounds. Franks v. Delaware, above, is by its very terms limited to intentional falsehoods and reckless disregard for the truth, in short, the sort of lies which would provide a basis for a perjury prosecution or a libel judgement. Anyone can misjudge probable cause; anyone can err on a pleading point, but no one has to lie. But, an Alabama officer who submits an affidavit for a search warrant, does so at the risk that at some point, a judge or appellate court may read into his or her affidavit false facts, which the officer did not express or intend to communicate and which the magistrate did not understand, and

then find himself or herself publicly declared a perjurer. Such will obviously have a gravely negative impact on the warrant process in Alabama. This policy established by the Alabama Appellate Courts is in clear contradiction of the Federal Constitution as interpreted by this Honorable Court.

In this case the officer had and recited in the affidavit a solid basis for believing the informer. He clearly attempted to relate in the affidavit the facts which he believed to be true on the basis of the informer's information and which, in fact, were true. There is no basis to even question these propositions. To be sure, the affidavit would never win an essay contest. After all, it was, "...drafted by [a] non-lawyer...in the midst and haste of a criminal investigation...." United States v. Ventresca, above, 380 U.S. 102, 108, 13 L.Ed.2d 684, 689. But, it cannot be disputed that the affiant officer

had certain facts and attempted to relate them in the affidavit. The affidavit was, therefore, truthful.

If the Court of Criminal Appeals thought that the words "...being stored in..." in the first paragraph implied that the informer went into the house, it could have either dropped those words from the affidavit or supplemented the affidavit with the fact that the informer did not go into the house, and then read the affidavit for probable cause. This is what is required by Franks v. Delaware, above, 438 U.S. 154, 171-172, 57, L.Ed. 2d 667, 682. In either case, probable cause would have remained. However, in reading into the second paragraph of the affidavit a fact which the language of that paragraph negated, the court went beyond the bounds of the after-the-fact warrant review allowed by the Fourth Amendment under this Honorable Court's opinions in Illinois v. Gates, above, and other cases.

The purpose of the Fourth Amendment's policy favoring warrants is the protection of citizens. The purpose of the rules formulated by this Honorable Court in pursuit of that policy is to insure that a warrant will be sought before a search is undertaken whenever such is possible. In this regard, the positive rules supporting officers who seek warrants are more effective than the negative rules which condemn officers who do not. The negative rules tend to encourage officers to look for excuses not to obtain a warrant; they encourage evasion and pretexturality. The positive rules, however, have the opposite effect and tend to encourage officers to go for warrants when it is possible to do so, even when there is a good excuse for proceeding without a warrant. But, the risks created for Alabama officers by the policy followed by the Alabama Appellate Courts negates the positive aspect of the Fourth Amendment's policy. For all of these reasons, the writ should issue.

II.
IN RE: BATSON V. KENTUCKY (476 U.S. 79 [1986])

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING OPINIONS OF THIS HONORABLE COURT

A.

THE THREE-STEP BATSON RPOCESS

In Batson v. Kentucky (476 U.S. 79, 90 L.Ed. 2d 69, 106 S. Ct. 1712 [1986]), this Honorable Court ruled that a criminal defendant is denied equal protection of the laws if the prosecutor practiced racial discrimination in striking the jury. In Batson, this Court set up a three-step process by which this issue is to be decided. Batson v. Kentucky, above, 476 U.S. 79, 96-98, 90 L.Ed. 2d 69,87-88. The three steps are: (1) The defendant must establish a prima facie case of racial discrimination by the prosecution. If that is done, (2) the prosecutor must advance race neutral for his or her strikes. Then, (3) the trial judge must determine if the

defendant has established purposeful discrimination. In Batson, this Honorable Court pointed out that this was basically an evaluation of credibility which is due "...great deference...." on review. Batson, note 21, 476 U.S. 79, 98, 90 L.Ed. 2d 69, 89. All of these principles were reaffirmed this year in Hernandez v. New York (500 U.S.___, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1865-1866 [1991]) In a number of appellate opinions allegedly aimed at "clarifying" Batson, the Alabama appellate courts have created such a state of confusion over this Court's decision that two of the three steps outlined by this Honorable Court have no practical application in Alabama. Ex parte Branch 526 So. 2d 609 (Ala, 1987); Harrell v. State 555 So. 2d 251, 262 (Ala. Cr. App, 1989); writ quash. 555 So. 2d 263 (Ala, 1989) (Harrell, I); Harrell v. State 571 So. 2d 1270 (Ala, 1990); cert. den. ___U.S.___, 113 L.Ed. 2d

736, 111 S. Ct. 164 (Harrell II) These cases clearly demonstrate that the Alabama appellate courts do not consider the three-step Batson process to be a fact finding process, as mandated by this Court. These cases represent efforts to define, as a matter of law, what is a prima facie case and what is a race neutral reason for striking a venireperson. The Alabama Courts have never commented on the third Batson step. In addition, the Alabama appellate courts do not follow the rules laid out in these cases consistently. For example, in the instant case and many others, the Alabama Courts have held that the failure of a trial judge to rule on prima facie case, before asking the prosecutor to state his or her reasons for their strikes constitutes an implied finding of prima facie case (Appendix "A", p.14). Yet, in Harrell I, above, the Alabama Supreme Court found that the trial judge's actions indicated a finding that no prima facie case had been

made out.[3] (555 So. 2d 263, 265). Nonetheless, the Court ordered the case remanded for the trial court to determine prima facie case.

All of this has created such a level of confusion that Alabama trial judges automatically react to Batson objections with an order to the prosecutor to state his or her reasons. This is what happened here. In Alabama, a prima facia case under Batson consists of a Batson objection.

In the instant case, the Trial Judge never ruled on the issues of prima facie case nor the ultimate question of purposeful racial discrimination. Since the Trial Judge found the reasons advanced by the Prosecutor to be race neutral, this was

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[3]In Harrold, a black prosecutor struck both blacks and whites from the venire. The resulting jury had a greater percentage of blacks than the venire. However, it was ultimately ruled by the Alabama Courts that the prosecutor had practiced racial discrimination against blacks. See Harrold II, above.

harmless error. Hernandez v. New York, above, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1866. But, since the Court of Criminal Appeals found that His Honor had erred with regard to several of the strikes, the error became harmful and, assuming the correctness of the Court of Criminal Appeal's ruling, this cause should have been remanded for the other two steps of the Batson process, as formulated by the Honorable Court.

The decisions and opinion of the Alabama Appellate Courts in the case and the policy which it represents cannot be reconciled with the controlling opinions of this Honorable Court. For this reason, the writ should issue.

B.

RACE NEUTRAL REASONS

The only issue addressed by the Alabama Courts was the racial neutrality of the Prosecutor's reasons for her strikes. In accord with the policy of the Alabama

appellate courts, which we discussed in the previous sub-section, this was treated as an issue of law, not a credibility choice as mandated by this Honorable Court. Batson v. Kentucky, note 21, 476 U.S. 79, 98, 90 L.Ed. 2d 69, 89, 106 S. Ct. 1712 (1986); Hernandez v. New York 500 U.S.___, 114 L. Ed. 2d 408-410, 111 S. Ct. 1859, 1868-1870 (1991) This is clearly demonstrated by the language of the Court of Appeals.

The Court of Criminal Appeals' summary analysis of the alleged need to reverse this conviction was as follows:

> "As stated above, this Court may reverse the trial court's determination that the state's peremptory challenges were not motivated by intentional racial discrimination only if the trial court's determination was "clearly erroneous". Mitchell, ___ So.2d at ___; Branch, 526 So.2d at 625. The United States Supreme Court recently stated in Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 112 1.Ed.2d 411 (1991), that:

> 'A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation to the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.'
>
> "Powers, ___ U.S. ___, 111 S.Ct. at ___.
>
> "We find therefore, that the prosecutor's challenges of the above veniremembers was so racially discriminatory and that it so tainted the proceedings that the appellant's right to equal protection was denied and he did not receive a fair trial. Accordingly, the trial court erred in denying appellant's Batson motion....' (Appendix "A", pages 21-11; emphasis supplied.)

Notice the Court of Appeals proceeds directly from the quotation of Powers to the conclusion that the case must be reversed as a matter of law. But under Batson and, under Hernandez, the issues are factual and

the racial neutrality of a prosecutor's reasons are issues of credibility - i.e. whether the trial judge was justified in believing the prosecutor. This error of the Court of Criminal Appeals permeates the Court's entire opinion on this point. It explains why the Court of Criminal Appeals felt justified in ignoring the fact that the Trial Judge could see and hear the Prosecutor, as she stated her reasons, see and hear the matters to which the Prosecutor referred (e.g. Juror No. 19's depressed look, Juror 25's hesitance in her responses, and Juror No. 75's dark glasses.) and would be familiar with conditions in Montgomery County. It also explains why the Court of Appeals saw no need to consider all of the factors recited by the prosecution for striking certain jurors and not striking others.

Two of the four venirepersons allegedly improperly struck by the Prosecutor were struck because they lived in "high crime

areas particularly for drugs". The Court of Appeals found that these reasons were not race neutral as a matter of law on authority of a court case and because an unstruck venirewoman came from a neighborhood with a higher than average crime rate.[4] (Appendix "A", p. 17) This later point is a good example of the Court of Criminal Appeals' narrow concern for reasons to find against this particular female prosecutor. The Prosecutor did not strike the venirepersons in question because of a higher than average crime rates in their neighborhood but because of high crime rates, particularly for drugs. This was, after all, a drug case.[5] In addition, the Court of

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4 It does not appear where the Court of Appeals got this information.

5 In addition to the fact that such persons would be likely to be involved with drugs or have personal relationships with persons who are involved with drugs, people who live in such areas would be more likely to fear retribution for convicting a drug dealer.

Criminal Appeals ignored the fact that there was a strong positive reason for retaining the venireperson from the alleged higher than average crime rate neighborhood - she knew a respected former police chief.

The Court of Appeals also found that striking Juror No. 75, because her dark glasses might indicate a medical condition, was not race neutral. The Court of Appeals ruled that the Prosecutor should have asked the lady about her condition. But, questioning people about their medical conditions can embarrass them and create resentment. The Prosecutor might have ended up with a juror who not only could not see but who also resented the prosecution. In addition, where is it written that a prosecutor has to credit a venireperson's responses at face value?

The Court of Appeals did not explain why Juror No. 25's chewing gun, hesitant responses and suspected non-disclosure of facts were not race neutral. Similarly, the

Court did not explain why Juror No. 19's apparent depression was not race neutral.

The fact is that living in a high drug crime area, wearing dark glasses indoors, chewing gum in the courtroom, hesitant responses, possible non-disclosure of facts and apparent depression are not factors identified with any race. This Honorable Court in Hernandez v. New York, above, defined a race neutral reason as follows:

> "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." 114 L.Ed. 2d 395, 406, 111 S. Ct. 1859, 1866)

At issue in Hernandez was whether a person's being bilingual in Spanish and English was

race neutral as to Hispanics. This Honorable Court ruled that it was in the context of that case. Under this standard the Prosecutor's reasons in this case were race neutral, and the Court of Criminal Appeals erred to reversal in ruling otherwise. However, the primary error of the Alabama appellate courts was in treating this issue as one of law instead of fact, as mandated by this Honorable Court's clear opinions on the subject.

For this reason, the writ should issue in this case.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided important questions under the Fourth and Fourteenth Amendments in a manner which conflicts sharply with the teachings of this Honorable Court. In addition, the policies established and followed by the Alabama appellate courts are contrary to the purposes of the policies established by this Court.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE
PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of December, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Brad Haywood Sims, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

Honorable Thomas M. Goggans*
Attorney at Law
Post Office Box 1307
Montgomery, Alabama 36101

Honorable Julian L. McPhillips** and
Honorable Kenneth J. Shinbaum**
Attorneys at Law
P. O. Box 64
Montgomery, Alabama 36101

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0289H